United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1158

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75 - 1158

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY RIZZO, et als.

PHILIP LUBRANO,

Appellant.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT PHILIP LUBRANO

HOCHHEISER & COHEN
Attorneys for Appellant,
Philip Lubrano
16 Court Street
Brooklyn, New York 11241
(212) 875-4268

LAWRENCE HOCHHEISER
KENNETH J. ARONSON
On the Brief

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4. Was not the defendant prejudiced by improper communication between the Prosecutor and two jurors so as to require a new trial?

5. Did not the Court err in failing to hold a full hearing on the improper communications between the Prosecutor and two jurors before ruling on defendant's motion for a mistrial?

PRELIMINARY STATEMENT

Defendant PHILIP LUBRANO was indicted along with two others, ANTHONY RIZZO and VICTORE VITALE, in a three count indictment returned by a Federal Grand Jury. All three defendants were charged in Count One with conspiracy to distribute and possession with intent to distribute cocaine. The second count of the indictment charged the defendant VICTOR VITALE only with possession and distribution of 102 grams of cocaine. The third count charged LUBRANO with possession and distribution of 112.2 grams of cocaine. (230 A)*

The case was tried before the Honorable Constance Baker Motley and a jury during January of 1975. On January 17, 1975, the jury found defendants LUBRANO, RIZZO, and VITALE guilty on Count 1 and defendant VITALE guilty on Count 2. LUBRANO was acquitted of the substantive crime charged against him in Count 3. (Tr. 980-981)**

On March 27, 1975, the defendant PHILIP LUBRANO was sentenced by Judge Motley to a prison term of five years. RIZZO was given a jail sentence, but that sentence was imposed to run concurrently with a longer sentence already imposed upon defendant RIZZO in connection with a prior

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*"A" references are to appellant's appendix.
**"Tr" references are to trial transcript.

conviction. The defendant VITALE received a sentence, the prison term of which was suspended. (234 A)

At the end of the Government's case and again after both sides had rested, a motion was made on behalf of PHILIP LUBRANO for dismissal and judgment of acquittal. (226b - 226s A). These motions were denied. (226s A)

STATEMENT OF FACTS

The Government's case against defendant LUBRANO was purely circumstantial and consisted almost entirely of testimony of special agents from the Drug Enforcement Administration, based on their surveillance of the three defendants and an informant, and tape recordings of conversations of people other than LUBRANO. Tony Finn, the confidential government informant and a key participant in the events in question, had died prior to the trial and, thus, was unable to testify.

The facts in the case can be summarized by reporting the events that transpired on several crucial days:

On May 1, 1973, defendant RIZZO and informant Tony Finn, carrying $800.00 provided to him by the law enforcement officers, met at Jay's Jewelry Box, a jewelry store located on Canal Street. (6A) Shortly thereafter, they exited together and proceeded to Block's Bar where they remained for several hours.(6 A) Defendant VITALE also entered this same bar; all three men then departed and next went to Jay's Jewelry Box where they remained for several minutes.(7 A)

Defendant RIZZO left the scene at this point

while defendant VITALE and informant Finn went into Finn's automobile (13 A) and discussed drug deals for about one-half hour. (14 A) Next, MR. VITALE left the car and Finn drove away.

At a predetermined spot, Finn turned over to the special agents from the Drug Enforcement Administration a quantity of cocaine (18 A).

On May 8, 1973, Finn arrived at Lucky's Bar in the Bronx. About twenty minutes later, defendant VITALE entered the same bar. The two conversed for about 45 minutes until they left the bar and went their separate ways (33 A).

Defendant LUBRANO was not connected in any manner with these two above-recited meetings.

On May 10, 1973, undercover informant Finn parked a car rented by the government containing $3,500.00 in cash in the trunk on Canal and Allan Streets (34 A). Finn entered the East Side Jewelry Exchange, which is defendant VITALE'S business establishment, and shortly thereafter left the store and was driven away from the scene by governmental agents (34 A).

Defendant VITALE was observed leaving his place of business, the East Side Jewelry Exchange, walking to his car, driving around, parking his vehicle alongside of

the rented auto, getting out of his car, unlocking the trunk of the rented car, removing the package which contained the $3,500 in marked money, getting back into his automobile and driving away in an uptown direction (34-35A).

On the 11th day of May, 1973, the rented vehicle was again driven back to the same Canal Street neighborhood and parked on the street (45 A). Between 5:00 and 6:00 P.M., MR. VITALE was seen leaving the East Side Jewelry Exchange and driving away in his car (47 A). Approximately one hour later at about 7:00 p. m., a young Oriental male approached the rented vehicle, unlocked its rear trunk, placed a package inside, closed the trunk, and proceeded to the East Side Jewelry Exchange (47, 142, and 220 A). A few minutes after this event, MR. VITALE again left the East Side Jewelry Exchange, got into his car, and proceeded in an uptown direction (47 A). The package deposited in the trunk, it was subsequently discovered, contained 102 grams of cocaine hydrochloride (54 A) and two $100 bills which were part of the money left in the rented car trunk on the previous day (55 A).

At about 6:30 p.m. on May 11, defendant VITALE was viewed in the vicinity of 56th Street and Lexington Avenue entering and leaving Kat Vin Jewelers and the Gion Bar which are only several feet away from each other (174

to 177 and 202 A). MR. VITALE, apparently spotting two people observing him, went over to a New York City policeman, spoke to him, and pointed to two special agents who were across the street (177 & 203 A).

On both the 10th and 11th days of May, defendant LUBRANO was never seen by any of the many government agents assigned to this case, not even at the Kat Vin Jewelry Exchange store where he worked and where VITALE was viewed on May 11, 1973.

On August 20, 1973, informant Finn was provided with $3,750.00 in government funds (69 A). Finn parked his automobile in the vicinity of 56th Street and Lexington Avenue and entered the nearby Gion Bar (69 A). Shortly thereafter, PHILIP LUBRANO was seen exiting from his shop, the Kat Vin Jewelry Store, and going into the Gion Bar, which is about two stores away (69 and 151-154 A). In the bar, two people who were talking to Finn at the bar counter, including defendant RIZZO, joined with Finn in exchanging greetings and conversing with Lubrano after he entered the bar (152 - 153 and 159 A).

Minutes later, Finn and LUBRANO came out of the Gion Bar, walked around the corner, and entered a luncheonette named the Gaiety East Luncheonette (70, 178 -

179, 185, and 204 A). After a passing of between three and five minutes, Finn was observed leaving the luncheonette, allegedly with a bulge in his front left pocket (70 and 207 A). He climbed into his motor vehicle and drove away from the area (70 A).

A short while later, Finn gave a Sepcial Agent a package (71 A) which contained 112.2 grams of cocaine hydrochloride (76 A). Government agents testified that they had no knowledge of their own as to who transferred this package to Finn and that there were an unknown number of people present in the luncheonette besides Finn and LUBRANO (74, 104, 168 and 186 A). It was conceded that, despite close observation, LUBRANO was never seen providing Finn with any cocaine (168 and 186 A) and that a third party in the luncheonette could have given Finn the package (103 A).

On October 4, 1973, Finn parked his car in the neighborhood of 56th Street and Lexington Avenue (77 A). LUBRANO was seen entering a large apartment building at 141 East 55th Street. Finn, sometime later, went into the same building separately (78 and 106 A). Finn exited from the residential structure alone approximately 20 to 30 minutes later, went to his auto, and drove away from the area (78 A).

Finn was given $6,400 by the law enforcement officials who he rendezvoused with (78 A), returned by car to the same locale, disappeared once again into the 141 East 55th Street apartment building, remained inside for a time period of about 15 minutes, and finally left the building carrying a cylinder (79 A), which he later gave to the government agents (80 A). The cylinder contained a quantity of cocaine. (Exhibit 16, 84A).

No government witness saw specifically where or from whom Finn acquired this cylinder (83 and 106 A). Nor was LUBRANO ever observed selling narcotics to anyone at anytime, although there were several extensive surveillances of him (97 A). Finally, the government agents admitted that they did not entirely trust their informant, Mr. Finn (102 A).

POINT 1

THERE WAS INSUFFICIENT PROOF TO CONVICT THE DEFENDANT OF CONSPIRACY TO DISTRIBUTE AND POSSESS WITH THE INTENT TO DISTRIBUTE COCAINE.

On the face of the record, there was insufficient evidence to support the jury's verdict of conviction of conspiracy to sell cocaine. The Government contends that through circumstantial evidence it has sufficiently established the defendant LUBRANO'S participation in the conspiracy. The reading of the record, however, will show that the evidence introduced against PHILIP LUBRANO fell far short of being sufficient to support a finding beyond a reasonable doubt that he was a participant in the conspiracy charged. Indeed, in all the reported cases our research has disclosed, there is scarcely one in which it could be said the evidence against the appellant was so thin, insubstantial and ambiguous as that which we find in the instant case. We include, of course, even those reported cases where the convictions of the appellant were reversed upon the grounds that the evidence was not sufficient as a matter of law.

The evidence throughout the entire case, viewed most favorable to the Government, established, as we have seen, the following facts, if taken as true:

On May 1, 1973, the defendants RIZZO and

VITALE met with the Government informant and discussed the sale of cocaine (6A and 14A). There was no evidence regarding the defendant LUBRANO in connection with this transaction (6-18 A), or in connection with the May 8, meeting between FINN and VITALE (33 A).

On May 10, 1973, the defendant VITALE received $3,500.00 from the Government informant for the purchase of cocaine. The defendant VITALE, in Manhattan, stated in a taped conversation with the informant that he would get the drugs from somewhere "uptown". The defendant VITALE left the vicinity of his retail store located in downtown New York City and drove in an uptown direction (34-35 A). There was no evidence as to where he went or whom he saw, if anyone, or whom he met. There was no evidence concerning LUBRANO, unless one were to associate the defendant LUBRANO with this transaction upon the theory that MR. LUBRANO owned a retail store which was located in Manhattan which could be characterized as "uptown." In any event, such a statement made by defendant VITALE that the drugs would be acquired from uptown would not, of course, be evidence against the defendant LUBRANO, unless the defendant LUBRANO'S involvement in or connection with the conspiracy was established alieunde by a preponderance of the evidence.

On May 11, 1973, the defendant VITALE caused his agent to deliver 102 grams of cocaine to the Government informant (47, 142 and 220 A). There was no evidence concerning this transaction inculpating the defendant LUBRANO, unless one considers the following thin shred of dubious information as germaine. On this day, a considerable time prior to the delivery of the cocaine by VITALE'S agent, VITALE, who was in the same jewelry line of business as LUBRANO, entered LUBRANO'S retail store on East 56th Street, in Manhattan (174 - 177 and 202 A). MR. LUBRANO was not seen at any time, nor was there any evidence that he had any knowledge of MR. VITALE'S visit (185 and 209 A). There was no evidence that if MR. VITALE had some particular purpose for his visit, MR. LUBRANO knew of it. Agents of the Federal Government were following MR. VITALE on this day in order to gather evidence in this matter. After MR. VITALE left MR. LUBRANO'S store, he spotted the agents following him and the agents observed him approach a uniformed New York City policeman (177 and 203 A). MR. VITALE pointed out the agents who had not, of course, made their identities known to MR. VITALE. The agents further observed that MR. VITALE, who, it must be remembered, was a jeweler and presumably carried valuable gems with him at times, having an

animated conversation with the policeman and receiving some advice or information from the policeman. (177 and 203 A)

On August 20, 1973, defendants RIZZO and LUBRANO were seen with the Government informant at a bar at 56th Street in Manhattan (152-153, and 159 A). There was no evidence introduced as to what the conversation concerned. If RIZZO and the informant discussed drugs, there was no evidence of any such knowledge on the part of LUBRANO. LUBRANO and the informant then went across the street and entered a luncheonette (70, 178-179, 185, and 204 A). There was no evidence introduced as to what other persons were in the luncheonette, or what the informant did in the luncheonette. Most importantly, there was no evidence introduced concerning what, if anything, the defendant LUBRANO did while in that luncheonette (186 A). There was no evidence introduced that PHILIP LUBRANO had any knowledge of the informant's purposes or intentions within the luncheonette. Nor was any testimony taken establishing that if the informant did anything of importance in the luncheonette that such activity in any way involved PHILIP LUBRANO. After a short time in the luncheonette, the informant and LUBRANO exited (70 A). The informant, at this time, had in his possession a quantity of cocaine(71 A). There was no evidence that PHILIP LUBRANO had anything whatsoever to do with this acquisition by the informant unless one simply <u>assumes</u> that LUBRANO went into

the luncheonette to deliver cocaine to the informant. It must be remembered that this assumed possession and delivery by LUBRANO in the luncheonette was the evidence presented to the jury in support of Count 3 which charged PHILIP LUBRANO with possession of the cocaine on August 20, 1973, in the luncheonette. Presumably because of the lack of evidence of such activity on the part of LUBRANO, as just described, the jury found insufficient evidence to support a verdict of guilty against PHILIP LUBRANO as to Count 3 and acquitted him of that charge.

On October 4, 1973, PHILIP LUBRANO entered the main entrance of a residential skyscraper on 55th Street in Manhattan (78 and 106 A). Some minutes later, the informant entered the same building separately (78 and 106 A). The informant then exited alone and re-entered alone (78A). Later the informant again exited the building, at which time he possessed a quantity of cocaine (79 A). There was no evidence adduced that defendant LUBRANO had anything whatsoever to do with this possession of cocaine by the informant (83 and 106 A). There was no evidence adduced that LUBRANO actually went anywhere in this building as opposed, for example, to simply passing through it. There was no evidence before the jury that LUBRANO ever met or even saw the

informant in the building or that LUBRANO knew where in the building or for what purpose the informant had gone there. As a matter of fact, there was not even any evidence introduced that the informant went to a location inside the building rather than simply walked through. These nebulous "facts" concerning October 4, 1973 were not the subject of any substantive charge against MR. LUBRANO or, for that matter, any of the defendants. Understandably, upon oral argument on the admissibility of the October 4, 1973 cocaine to support the conspiracy charge, the Prosecutor conceded that this evidence was extremely weak. (84 - 85A) Assistant U.S. Attorney Timbers evidenced some surprise upon the Court's ruling that the October 4, 1973 cocaine would be admitted into evidence. Similarly, in his oral arguments to the Court and in his summation to the jury, Mr. Timbers conceded that the Government's charges were not seriously based upon what the record clearly showed to be nebulous activity on the part of LUBRANO on October 4, 1973. (226i, 226n, 226w-226y A).

In view of the above, it is important to note that the Prosecutor to the jury and in his oral arguments to the Court, based his case against defendant LUBRANO

virtually entirely upon the evidence concerning the events of August 20, 1973. The Assistant United States Attorney and the Trial Court Judge noted during oral arguments that there was no evidence with respect to LUBRANO up until August 20 (226i - 226y A). Though we certainly believe that all of the above evidence is insufficient as a matter of law to support the conspiracy conviction against PHILIP LUBRANO, the August 20, 1973 evidence has become even more critical in light of the jury's verdict. This is so because the very same August 20, 1973 evidence upon which the Prosecutor relied to support the conspiracy count was also the sole evidence supporting the substantive count against LUBRANO. As we mentioned above, the jury acquitted LUBRANO on said substantive count based upon the August 20, 1973 evidence. We are not unmindful that in many cases a jury may acquit a defendant of one count and convict him of another based on the same or related evidence. We submit, however, that under the facts and circumstances of this case, the jury's verdict of not guilty as to the substantive count underscores our position that the evidence against PHILIP LUBRANO was insufficient as a matter of law to support a finding that he was connected to the charged conspiracy.

As spelled out above, all the evidence in the record, taken in a light most favorable to the Government, is insufficient as a matter of law to support the instant conviction. We submit that the minimum requirements of legal sufficiency of evidence to support a conspiracy charge such as this may be found in the case of the United States v. Calabro, 449 F. 2d 885 (2d Cir. 1971). In Calabro, while the evidence against Mr. Calabro was essentially circumstantial, it was infinitely more sufficient than the evidence in the instant case concerning MR. LUBRANO. In the Calabro case, the defendant was present or in close proximity to the co-conspirators "at the most critical junctures of the conspiracy." 449 F. 2d 885, 889.

In addition, there was evidence of the defendant's "scrutiny of the agents" and "his close observation of critical discussions" between the parties. Moreover, Mr. Calabro had personally frisked one Boccio to insure himself that it was safe to conduct narcotics business with him. This act of Mr. Calabro was considered by the Court to be 'bf critical importance". The Court viewed Calabro as "a close case." The evidence in the instant case is certainly less sufficient than that found in Calabro.

We most sincerely urge that the Prosecutor's case against the defendant is,in reality, based on guilt by association. Yet, Courts in this jurisdiction have consistently held that mere association with an alleged conspirator, without more,is insufficient for a finding of participation. United States v. Stromberg, 268 F. 2d 256, 267 (2nd Cir. 1959), cert. denied sub non. Lessa v. United States, 361 U.S. 863 (1959); United States v. Calabro, 449 F 2d 885, 890 (2nd Cir. 1971); United States v. Bentvena, 319 F. 2d 916, 949 (2nd Cir. 1963), cert. denied sub nom. Mirra v. United States, 37 U.S. 940 (1963); and United States v. Cimino, 321 F. 2d 509, 510 (2nd Cir. 1963), cert. denied, 375 U.S. 974 (1964).

For example, in Cimino, supra, 321 F. 2d at 510, this Court found in a prosecution for the illegal selling of heroin and conspiracy to sell heroin that the mere meeting of the two defendants on two separate occasions without evidence as to their conversations or as to what passed from one to the other was no evidence of their being conspirators. Nor was one defendant's statement to a government undercover agent that the other defendant was "the source" of the heroin being sold competent evidence against the other defendant. Likewise, the mere meeting of defendants LUBRANO

and RIZZO and informant Finn at a bar, and of LUBRANO and Finn at the luncheonette on August 20, without testimony as to their conversations or as to whether indeed anything passed from one to the other is no evidence of their being conspirators. Evidence as to the events of October 4 at the apartment building fails to even establish that LUBRANO and Finn ever met as they were never seen either entering or leaving the residential skyscraper together nor were they seen in each others presence in the building.

United States v. Vilhotti, 452 F. 2d 1186, 1189 (2nd Cir. 1971), also stands for the above principle. In Vilhotti, the Court of Appeals, Second Circuit, stated that the absence of any evidence, apart from their mere presence, to support the government's contention that two of the defendant's knew that the stolen goods were in the garage requires a reversal of their conviction on the conspiracy count. Their presence establishes that they were only acquainted with the other defendants, but this is clearly insufficient to sustain a conspiracy conviction. Certainly the presence of LUBRANO in the company of RIZZO and VITALE only establishes their acquaintanceship, which is not

surprising as all three defendants were jewelers.[1](226a A)

In United States v. Euphemia, 261 F. 2d 441 (2nd Cir. 1958), this Court decided that the Government was required to show, in a prosecution for conspiracy and narcotics offenses, more than that the defendant was acquainted with the seller of narcotics or that the two men were friends, and proof that the defendant knew the seller of narcotics and rode seventy blocks in the same vehicle with him was not enough to prove that the defendant had been the seller's "partner" in the illegal sale of narcotics.

A defendant's "participation in the conspiracy which the Government sought to prove can be established only by proof, properly admitted into evidence, of their own words and deeds." United States v. Russano, 257 F. 2d 712, 713, (2nd Cir. 1958). "Such independent proof must be substantial and not too slight." United States v. Bentvena, 319 F. 2d 916 (2nd Cir. 1963). Concerning LUBRANO, clearly the prosecution has failed to meet this standard of proof. The evidence induced at trial as to LUBRANO'S activities simply do not support the necessary inferences to sustain his conviction.

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[1]This argument gives the Government more than the best view of the evidence because while Lubrano was seen in the company of Rizzo on August 20, 1973, he was never shown to have ever met, seen, or even heard of Vitale.

Furthermore, even this thin evidence laid out above has important defects in addition to its sufficiency. Much of the evidence laid out above was, in our judgment, legally inadmissible. As an illustration, the evidence that the defendant VITALE was to obtain the cocaine "uptown" (May 10, 1973) was inadmissible as hearsay in regard to LUBRANO. This is so because there was no independent evidence apart from this statement of an alleged co-conspirator which established defendant LUBRANO'S connection to the conspiracy. Thus, the evidence, meagre as it was in any event that VITALE was to obtain the drugs "uptown", was really evidence used against the defendant LUBRANO to establish his connection with VITALE in the conspiracy. But LUBRANO, in our sincere judgment, was not proved independently of this to be a partner in crime to VITALE. It is well settled that there must be independent evidence establishing a defendant's participation in a conspiracy before such declarations are admissible against him. Glasser v. U.S., 315 U.S. 60, 74 (1942), and United States v. Consolidated Laundries Corp., 291 F. 2d 563, 576 (2nd Cir. 1961). Moreover, in the Second Circuit, this association of the defendant with the conspiracy must not only be made independently, but must meet the test of a "fair preponderance of the evidence." United States v. Geaney, 417 F. 2d 1116, 1120 (2nd Cir. 1969), cert. den., 397 U.S. 1028 (1969).

The other major categories of evidence which were inadmissible because of untrustworthiness were hearsay and certain insinuations concerning tape recordings which had, prior to trial, been ruled wholly inaudible and inadmissible. Such evidence is the subject of separate points herein.

POINT II

THE COURT ERRED IN PERMITTING THE JURY TO HEAR INCOMPETENT EVIDENCE, PARTICULARLY INADMISSIBLE HEARSAY, OF A MATERIAL NATURE.

As demonstrated in Point I, supra, there was insufficient competent evidence introduced against MR. LUBRANO to support his conviction.

At the risk of engaging in unfair speculation, it is suggested that substantially all of the material evidence the Government had originally hoped to introduce against MR. LUBRANO was to have come from the lips of the informant, Tony Finn. Giving the Government the benefit of the question, it must be conceded that Mr. Finn's unavailability at the time of trial occasioned by his untimely death left an obvious and serious void in the evidence concerning MR. LUBRANO. (226u A)

The record would seem to disclose a predetermined plan on the part of the Prosecutor to attempt to fill this void with incompetent and otherwise inadmissible evidence, implications and insinuations. This approach usually manifested itself in the subtle but highly prejudicial infusion into the trial of the out of court, unsworn allegations against MR. LUBRANO by Tony Finn.

The groundwork for the extra-legal approach to the Government's problem appears in one of the first questions asked in direct examination of the Government's first and most important witness, former Drug Enforcement Administration Special Agent Michael A. Peterson.

Q. (By Assistant United States Attorney John Timbers).

Will you describe that investigation to the jury, starting from the beginning?

A. In early 1973, I developed an informant (Finn)... for the purpose of initiating...narcotics cases against narcotic traffickers. (2-3 A)

It is important to note that the theory of the Government's case, as explained to the jury, was that co-defendant RIZZO was obtaining his drugs for sale from co-defendant VITALE, who, in turn, was obtaining the contraband from defendant-appellant LUBRANO (226v A). The following piece of testimony taken from Agent Peterson had special meaning in the trial for this reason:

Q. Agent Peterson, what was the purpose of giving Mr. Finn $800 on the night of May 1, 1973?

A. Mr. Finn was to purchase one ounce of cocaine for a price of $800.

Q. Who was he to purchase that from?

A. I told Mr. Finn to meet with Mr. Rizzo at the determined spot and Mr. Rizzo's connection, which was understood there would be one, and purchase one ounce of cocaine for $800.00. (Tr. 129-131 and 24-25 A)

* * * * * * * *

The Court: We will take that subject to connection as against Lubrano....

Here we see the beginning of a method of questioning calculated to show the jury what claims and accusations were being made by the absent Tony Finn. Phrases like "determined spot" and "Mr. Rizzo's connection, which (there) was understood to be one" seem merely gratuitous and benign at these early stages of the presentation of the evidence. They become more meaningful as the Prosecutor's method is employed more boldly concerning essential elements of proof. In the next passages, we start to see more clearly the absent Tony Finn in effect testifying against MR. LUBRANO. In reading these excerpts, it should be noted that there were only two dates of real importance in the case against MR. LUBRANO: August 20, 1973 and October 4, 1973.

Q. Agent Peterson (in) the middle of August, 1973, what, if anything else, did you do in connection with this case?

A. (A)round August 20, I instructed Mr. Finn to purchase an eight kilogram of cocaine from an individual known at that time to me only as Philly. (64 A)

Already we start to see that in the cause of the investigation Agent Peterson was acting pursuant to apparently important and specific information about PHILIP LUBRANO. But the integrity of the source of information will not be subject to examination during the trial.

The following portions of Mr. Peterson's direct testimony begin to define this out-of-court source. It becomes clear that Mr. Peterson's instructions to the informant, Tony Finn, are based upon accusations and other information first provided to Peterson by Finn. Here the Prosecutor becomes more subtle. Realizing that he cannot hope to ask the agent what Finn told him about where Finn expected to purchase cocaine, Mr. Timbers carefully phrases his questions to elicit what "instructions" the agent gave Finn.[1]

> Q. Did you give Mr. Finn any instructions at the time you searched his car?
>
> * * * *
>
> A. I provided Finn with $3,750 serialized official funds and instructed him to purchase one -eighth kilogram of cocaine from this individual known to me at this time as Philly. (68-69A)

At this stage of the proceedings, then, the jury has been infused with the notion that there will appear in the case, as the evidence develops, a certain "Philly", who is a narcotics dealer. No cross-examination of the agent's

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[1] In the interest of fairness, it should be noted that the Prosecutor, Assistant United States Attorney John Timbers, is a man of unquestionable integrity. Though we verily believe Mr. Timber's approach to have been legally impermissible, there is no doubt that Mr. Timbers himself believed this technique legal and proper.

source, Mr. Finn, will ever be possible, of course. PHILIP LUBRANO'S guilt, then, must be assumed upon the taking of the following testimony from Mr. Peterson:

* * * *

Q. What happened after Tony Finn entered the Gion Bar?

A. ...I observed an individual later identified to be PHILIP LUBRANO...enter the bar.

Q. What happened after the defendant LUBRANO entered the Gion Bar?

A. ...Mr. Finn and Mr. Lubrano came out of the bar, they walked around the corner and entered... the Gaiety East Luncheonette...

Q. What happened next?

A. They remained inside for a very short time, five minutes, three minutes, at which time Mr. Finn exited the luncheonette. At this time I observed him to have an obvious bulge in his left front pocket. He got directly into his car, drove from the area. I followed him from the area, met with him, at which time he provided me with a package. It contained (Exhibit 15: 112.2 grams of cocaine hydrochloride). (70-71 and 76 A)

The members of the jury at this point, one may assume, had implanted in their minds the understanding that Tony Finn had told Agent Peterson that PHILIP LUBRANO, known to Finn as Philly, was a "narcotics trafficker" as described in Peterson's earlier testimony and that Philly had agreed, during some out of court meeting, to sell Finn one-eighth kilogram of cocaine for exactly $3,750.00.

This insinuated "testimony", it is submitted, was the truly material evidence against MR. LUBRANO, since the competent evidence established slight suspicion at most.

The following voir-dire examination by LUBRANO'S attorney could not have been hoped to solve the already serious problem.

Voir Dire by Mr. Hochheiser:

Q. Can you tell us of your own knowledge who gave this to Mr. Finn?

A. I cannot.

Q. Agent Peterson, this luncheonette that you saw Mr. Finn was in with Mr. Lubrano, (were) there any other persons in it?

A. Yes, sir. (74 A)

The Prosecutor immediately picked up where he left off:

* * * * * *

Q. Agent Peterson, (in) October, 1973, did you do anything else in connection with this case?

A. I met with Mr. Finn just prior to... October 4, and instructed him to meet with Mr. Lubrano and agree to purchase a quarter kilogram of cocaine. I subsequently met with Mr. Finn and instructed him...on October 4, to meet with Mr. Lubrano and determine whether in fact Mr. Lubrano had a quarter kilo of cocaine for immediate sale. (76-77 A)

It is absolutely clear from this question and answer that the absent witness Finn had told Agent Peterson

that (1) PHILIP LUBRANO was a drug dealer and was, in general, willing to sell to Finn, (2) that Finn met with LUBRANO at which time LUBRANO specifically agreed to sell Finn a quarter kilo of cocaine, but that the immediacy of such was in question, and (3) that LUBRANO had agreed to meet Finn on October 4 for the possible consummation of such a sale.

This implied "testimony" of Finn was infinitely more damaging, of course, than the relatively benign competent testimony actually given against LUBRANO by Agent Peterson.

A strenuous objection was interposed by MR. LUBRANO'S attorney, as had been done on the previous occasions. The Court was apparently unimpressed with counsel's argument. It is respectfully submitted that the Prosecutor's adroitness in disguising this pure hearsay effectively created the illusion of admissible evidence which seemed to the Court to pass the traditional field tests against hearsay testimony.

* * * * * *

Mr. Hochheiser: Your Honor, again I am going to object. This is just a ruse to enable this jury to hear implicitly what this agent is really telling (them) the informant told him.

The Court: No, we have been over this objection previously. It is not hearsay,

> because what the witness is testifying to is a statement that he made out of court and since he is here to be cross-examined as to his own statements it is not hearsay. Overruled. (77 A)

The following questions and answers were then permitted:

Q. Proceed, Agent Peterson.

A. (The agent observed Mr. Lubrano enter a large apartment building at 141 East 55th Street, which building Mr. Finn entered shortly thereafter). (Finn) remained inside for...20, 30 minutes...came out of the building, proceeded to his car and drove from the area.

. . . . . .

(A)fter he had been in the (building), I met with him, gave him $6,400 and instructed him to purchase a quarter kilogram of cocaine. (78 A)

Clearly implicit in this testimony, of course, is a whole body of "testimony" by the absent witness Finn. Again the device of having the agent tell the jury of his "instructions" to Finn is employed by the Prosecutor to disguise the inadmissible hearsay nature of Finn's allegations to Peterson in order to get Peterson's evidence to appear to pass the tradition tests against hearsay.

The Prosecutor, however, went even further:

Q. Excuse me. Did Mr. Finn say anything to you

when you met him at that prearranged location?

Mr. Hochheiser: I have to object...

The Court: Are you asking him to tell us what Finn said?

Mr. Timbers: No.

A: We had a conversation. As a result of this conversation, I gave Mr. Finn $6,400 and instructed him to purchase a quarter kilogram of cocaine from Mr. Lubrano.

An objection was taken immediately and, again, LUBRANO'S position was placed in the record. The Prosecutor's "disguise" was, however, still effective:

Mr. Hochheiser: I object...what is the jury supposed to infer from the statement that "as a result of the conversation I gave him $6,400"?

We have a conversation implicitly in here from a man who isn't going to testify. What am I supposed to do with that?

The Court: Overruled. (79 A)

Thus, the agent's testimony continued:

A: (Finn) returned to 141 East 55th Street... entered the building again, remained inside for...15 minutes or so (and) came out of the building. This time...he was carrying a (particularly described package, Exhibit 16, stipulated to contain cocaine, which he gave to the agents.) (79-80 A)

The effect of the out-of-court "testimony" of Tony Finn cleverly introduced through Agent Peterson was not disspelled by a voir dire examination, which on its face, it is submitted, required exclusion of the October 4 evidence against MR. LUBRANO.

Voire Dire - Hochheiser:

Q. Mr. Peterson, you didn't see who gave Exhibit 16...to Mr. Finn, did you?

* * * *

A. No, sir, I did not.

Q. (M)ay I correctly presume nobody found my client's fingerprints on (Exhibit 16)?

A. Not to my knowledge. I could not know.

Q. Can you tell this jury...of your own knowledge where Mr. Finn or from whom Mr. Finn acquired that...?

* * * *

A; I didn't see Mr. Finn receive that package.

Q. So from your own knowledge you cannot testify that Mr. Lubrano gave it to him; is not that true?

A. (T)hat's true.

Mr. Hochheiser: I object to the introduction of this,Your Honor.

The Court: Overruled. (83-84A)

Mr. Hochheiser: Your Honor, the only testimony about Exhibit 16 is that they saw Mr. Lubrano and Mr. Finn go into

the same large New York City apartment building, not even together. They didn't even have any testimony that they went into the same apartment. There is absolutely no evidence that Mr. Lubrano gave or caused the transfer of Exhibit 16 to Mr. Finn...

Mr. Timbers: (T)he only evidence the Government has of this transaction is that the defendant Lubrano walked into the(building) and minutes later... Finn walked into the (building).

* * * *

There has been no testimony that Lubrano left thereafter. And Finn...came out of the(building) after he had entered shortly after Lubrano. And then after meeting with the agent received the money, went back up in the (building) again and came out again.

Mr. Hochheiser: There is no evidence between Mr. Lubrano and any apartment in the building.

The Court: Overruled. (84-85 A)

During the course of the trial, MR. LUBRANO'S position had been, as it is now, that there existed no competent evidence that MR. LUBRANO had any involvement whatsoever with any cocaine transactions. Consistent with this, counsel for Lubrano sought to establish that in fact there had been no observations whatever by any competent witness

of MR. LUBRANO giving the informant, Tony Finn, the drugs claimed to have been delivered by Lubrano. Thus, the following testimony was taken by LUBRANO'S counsel upon cross-examination of Agent Peterson:

Cross-Examination by Mr. Hochheiser:

Q. (D)id you ever take the trouble to personally ...follow Mr. Lubrano, (to) see if he sells cocaine to other people?

A. Yes, sir...

* * * *

Q. And the only cocaine that you can attribute to Mr. Lubrano in this courtroom is cocaine that Mr. Finn gave you?

A. That's correct. (97 A)

Q. (Concerning the August 20 allegation), you never heard from any agent that they saw Mr. Lubrano gave anything to this Finn in that bar, did you?

A. (N)o, sir. (104 A)

* * * *

Q. You never heard any agent say or report that he saw Mr. Lubrano give this Finn anything in that luncheonette, did you?

A. No, sir... (105 A)

* * * *

Q. Then we come to October 4. Again, you didn't see Mr. Lubrano handle, touch or have anything

to do with any cocaine; is that right?

A. I didn't see him handle or touch any, no, sir.

Q. And the cocaine that you...introduced into evidence here you got from Mr. Finn, isn't that right.

A. That's correct.

Q. Your observations consisted of seeing Mr. Finn and Mr. Lubrano go into a (big apartment) building, is that right?

A. That's correct.

Q. And they didn't go into that building together did they?

A. No, sir, they did not.

Q. They went in that building separately, didn't they?

A. That's correct. (106 A)

* * * * *

As stated above, there was introduced at the trial no competent evidence whatsoever of any involvement in the narcotics transactions by MR. LUBRANO. That the Prosecutor's hope for conviction of LUBRANO rested upon his plan to place inadmissible hearsay evidence before the jury is very well documented in his re-direct examination of Agent Peterson. Mr. Timbers here does more than merely admit his intention to adduce the out-of-court accusations of his absent witness,

Tony Finn. He seeks to justify the damaging insinuations inherent in his questions by pointing out that, absent the inferences he hopes the jury to draw therefrom, the remaining evidence would not be substantial enough to produce a guilty verdict.

Along these lines, the following question was asked to impress the jury that the absent Tony Finn had told the agent that he had received the contraband from MR. LUBRANO:

> Q. Mr. Hochheiser, Mr. Lubrano's attorney, asked you yesterday whether any agent told you that (he had seen) Lubrano give Finn drugs in the Gaiety East Restaurant,...and your answer was no.
> My question is: Did anybody tell you that Lubrano had given Finn drugs in the Gaiety East Restaurant?

The question itself, even without an answer, was devastating. The Prosecutor's purpose is revealed in the following colloquy at the side bar where an objection was being argued:

> Mr. Graber: It is apparent from the quotation that Mr. Timbers was trying to elicit from the witness what Mr. Finn told him.... (w)hat Mr. Timbers is attempting to do now is put in total and complete hearsay by Mr. Finn before this jury....(110 A)
>
> . . . . .
>
> Mr. Hochheiser: Yes. What I asked the witness was whether the surveilling agents had seen any drugs passed ...But that doesn't mean that I

would wish to have this hearsay statement by Finn, whose credibility I don't trust, come into this record. I can't cross-examine Finn. It was the other agents, not their knowledge, but their observations I was asking about. (110 - 111 A).

* * * * *

(W)hat I am suggesting is that...no agents ever saw Lubrano give this stuff to Finn. I don't contest that Finn probably told the agents that he got it from Lubrano, but at the same time naturally that is inadmissible. (111 A)

* * * * *

Mr. Timbers: No agent was inside the Gaiety East. The only basis (the witness Peterson) has for...what happened inside the Gaiety East is what Finn told Peterson.

Mr. Hochheiser: That's clearly inadmissible, Your Honor. That would be reversible error. (112 A).

* * * * *

Mr. Timbers: Nobody will testify about what happened in the restaurant. There was no surveillance in the restaurant.

The Court: Has this witness testified that he received that package (from Finn)?

Mr. Timbers: Yes.

The Court: It's implied in that, isn't it, that Finn told him where he got it?

* * * * *

Mr. Timbers: It is implied in the testimony we have had already and, therefore, I don't think what I am proposing to ask is terribly damaging because I think the jury can draw the conclusion that Finn said he got it from Lubrano since they sent Finn out on another deal with Lubrano two months later. (115 A).

* * * * *

The Court: I think this, Mr. Timbers. If you agree that Mr. Hochheiser carefully limited his question to whether any agent or this witness observed, you can't bring in Finn's hearsay.

Mr. Timbers: I would just say that leaves the Government in the rather preposterous situation of having a witness who testifies that he observed nothing in the bar between Lubrano and Finn, and...still this agent sent Finn on October 4, to buy drugs from Lubrano. (118 A)

* * * * *

Mr. Hochheiser:...The Government is in a difficult situation because the key witness here against Lubrano who would be competent to give this evidence is not available...That is the difficulty with the Government's case. It is based on lack of competent evidence. (119 A).

* * * * *

The Court: The objection to the question is sustained. (122-123 A)

Although the implication in the question which resulted in the side-bar conference was extremely prejudicial to MR. LUBRANO in and of itself, the Prosecutor vigorously pursued his plan to get the out-of-court "testimony" of the absent witness, Finn, before the jury.

For example, the Prosecutor put the following question to Agent Peterson on re-direct examination immediately following the side-bar conference:

> Q. ...Mr. Hochheiser on behalf of Mr. Lubrano, asked you yesterday whether it wasn't true that the only cocaine that you attribute to Lubrano was the cocaine that you received from Finn, and you answered yes, the only cocaine that you could attribute to Lubrano was the cocaine that you received from Finn.
>
> * * * * *
>
> Q. My question is: what items of evidence... that you received from Mr. Finn do you attribute to Mr. Lubrano? (123 A)

The purport of the question, quoted supra, put by LUBRANO'S attorney (97 A) was clear. Consistent with LUBRANO'S contentions, no witness could testify to any observation or other personal knowledge of LUBRANO indicating LUBRANO'S responsibility for the contraband he was charged with distributing. These witnesses could only testify to having received these items from Finn, the absent

witness. (127, 130-132 A) The Prosecutor, in his argument to the Court, distorted the clear purport of LUBRANO'S attorney's question in order to serve his own purpose of insinuating the hearsay accusations of Finn. (123-137 A).

The Prosecutor succeeded in making the situation at hand so confusing and confounding to the Court that the following unseemly colloquy and ruling resulted:

The Court: (to Mr. Hochheiser) You are also making the point that all (the witness Peterson) knew about the cocaine which he received came from Finn, and Finn's statement to him that he got it from LUBRANO or whoever, isn't that right?

Mr. Hochheiser: It's just that all the cocaine that he introduced from Lubrano came from Finn. There is no way that my questions permit anybody to ask (Peterson) what his state of mind is about Lubrano...I asked him about the facts. I asked him whether he searched (Lubrano's) place of business, whether he tailed him and followed him, whether he made observations. That is what I am talking about. Mr. Timbers has seized upon a word, "attribute", that I used in order to identify the two items...

The Court: No, I think your point was to show that Finn was a person who could not be trusted.

Mr. Hochheiser: Right.

The Court: You went into his character without objection from the Government.

Mr. Hochheiser: That's right, Judge. So?

The Court: What you were trying to show is that Finn could have said anything to this man.(137 A)

Mr. Hochheiser: That's right.

The Court: So the Government can now pursue that and ask this agent what Finn told him about any drug transaction with LUBRANO.(138 A)

Motions for mistrials were made and denied. (455-6 A).

The Prosecutor then elicited from the agent the agent's opinions and conclusions, obviously based upon Finn's out-of-court accusations, as to which of the contraband introduced through the course of the trial he believed had been supplied by MR. LUBRANO. Naturally, the agent listed all of the cocaine in the case, including that which had not even as yet been ruled by the Court as sufficiently connected to LUBRANO to be received in evidence against him. (139 A)

As the matter stood, the unfair inferences to be drawn against MR. LUBRANO were beyond effective remedy. LUBRANO'S attorney, however, felt duty bound to make an attempt. The cure was worse than the disease:

Q. (By Mr. Hochheiser, recross-examination)

...Just so the jury isn't confused, you didn't make any observations on May 10, concerning Mr. Lubrano that you left out of your testimony, did you? (139-140 A)

* * * * *

A. No, sir.

Q. This conclusion of yours, or this attribution of yours concerning the May 10 cocaine transaction, that's not based on your personal observations, isn't it?

A. If you mean personal observations, did I actually see Mr. Lubrano...

Q. See it, hear it, touch it; yes, did you?

A. No. They are drawn from other sources. (140 A)

It is respectfully submitted that even in a case involving substantial competent evidence of a defendant's guilt, the Prosecutor's technique described above and the resulting infusion of incompetent hearsay into the minds of the jurors would be troublesome to a reviewing court.[2] Because in the instant case there existed, as a matter of law, we submit, insufficient competent evidence for the conviction of defendant-appellant LUBRANO, the introduction of the incompetent hearsay takes on very special importance. A reading of the record clearly shows that absent such legally impermissible information, MR. LUBRANO should have and would have been acquitted.

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[2]Of interest also is the Prosecutor's summation remarks to the jury which stressed the importance of the out of court declarations of Finn. As an illustration, Mr. Timbers stated to the jury: "You noticed that during the trial defense lawyers were very careful to ask each witness, 'of your own knowledge.' They didn't want you to hear what Tony Finn could have told you about what happened in these (narcotics) transactions." (226t-226u A)

POINT III

THE TRIAL COURT ERRED IN DENYING MOTIONS FOR MISTRIAL FOLLOWING MISLEADING TESTIMONY ABOUT TAPE RECORDINGS PREVIOUSLY RULED INADMISSIBLE BECAUSE OF INAUDIBILITY

In the course of the investigation, tape recordings obtained via a transmitter concealed upon the person of the absent informer, Tony Finn, were made on four occasions: May 1, 1973, (4-6 A), May 10, 1973 (33-34 A), August 20, 1973 (64 A) and October 4, 1973 (192 and 194 A).

The May 1, 1973 and May 10, 1973 tapes involve only the co-defendants, RIZZO and VITALE. Those of August 20, 1973 and October 4, 1973 presumably pertain to the two transactions in which the informant "claims" the defendant-appellant LUBRANO sold him cocaine. We quote the word "claims" advisedly, since the record shows that the only "testimony" against MR. LUBRANO comes from inuendo and hearsay emanating from this informant who did not, in fact, testify at any time.[1]

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[1]The informant, Tony Finn, was deceased at the time of trial (3 A). For the purpose of our arguments, we have presumed he would have been brought to court had he been alive, though, in fact, this is beyond our knowledge.

As a result of motions made by the defendant-appellant, LUBRANO, pre-trial hearings had been held by the Trial Court to determine whether the August 20 and October 4, 1973 tapes were inaudible as a matter of law and, therefore, inadmissible at trial. (Tr.2-40,12). The Court had ruled these two tapes to be wholly inaudible and inadmissible. The Court's action in no way had involved those exclusionary rules of evidence designed merely to inhibit illegal methods of law enforcement officers. Rather, the Court in its findings and rulings had considered solely the untrustworthiness of the evidence. It acted wholly to protect the integrity of the fact finding process itself. (65-67 A)

Nonetheless, the Trial Court permitted, over objection, D.E.A. Agent Peterson to testify during his direct examination that during the course of the alleged August 20, 1973 transaction between the absent witness, Finn, and defendant-appellant, LUBRANO, Finn was wearing "the electronic transmitting device" (64-68 A). This "electronic transmitting device" had been previously described by this Government witness as involving a transmitter, hand-held receivers, and a receiver coupled with a tape recorder. (6 and 36 A).

Thus, the jury would naturally infer that Finn's

claimed conversation with LUBRANO was overheard by the agents and recorded.

It is important to observe that the absent witness, Finn, was conceded to have had the background and character of a rogue and scoundrel. (102-102b A) Quite naturally, then, his actions concerning MR. LUBRANO--unverified and uncorroborated, as they were, by normally reliable witnesses such as government agents--were throughout the trial severely attached by LUBRANO'S attorney. This was of special significance because there existed in fact not one shred of substantiation of any drug dealing on the part of MR. LUBRANO either with the informer, the co-defendants or anyone else. (85, 97, 103-104, 106-107, 168, and 183-186 A). Indeed, this was expressly conceded by the Prosecutor. (84 - 85 and 112-115 A).

By telling the jury that the informer, Finn, wore a transmitter and thereby giving the jury the impression that government agents overheard and recorded Finn's pertinent conversations on August 20, 1973, the Prosecutor effectively eliminated the jurors' natural distrust of this crucial but absent witness. Their hesitancy , drawn from life's experiences in accepting certain inferences from such a character, was most certainly cast aside. It was

eminently reasonable for the jurors to conclude that if Finn had not spoken with LUBRANO or did not purchase drugs from him, the transmissions and the tapes would have revealed this truth and testimony about this would have come either through the defense or through a government agent. In fact, however, it was precisely because the tapes were unable to reveal the truth of what sort of conversations Finn had or with whom he had them that the Court had previously ruled the August 20 and October 4, 1973 recordings inadmissible.

The very same error was permitted without remedy as to the second of the only two alleged conversations between MR. LUBRANO and the absent witness, Finn (191A). This was claimed to have occurred on October 4, 1973--the date involving that meager evidence establishing merely that MR. LUBRANO and Mr. Finn at different times entered the same residential skyscraper in Manhattan.

In this instance, not only did the Government witness, Agent Sennett, specifically reveal the existence of the tape recording of October 4, 1973, he expressly told the jury that "it's not been allowed in Court". (192 A). Clearly, the jury must have assumed that the tape corroborated and verified that the absent witness, Finn, purchased drugs from MR. LUBRANO, but, perhaps for technical legal reasons, was not admitted into evidence. The only reasonable

inference the jury could have drawn was that the tape was audible and useful in light of the agent's testimony that he had used the tape to "contribute...to the writing of the report of the events (cf October 4, 1973)." (191 A)

Although defendant-appellant LUBRANO'S attorney immediately moved for a mistrial out of the presence of the jury--as he had done concerning the testimony on the same point by Agent Peterson regarding August 20, 1973,--the Court stated that it did not see "how...that prejudice(s) your client" (194 A). After considerable argument (194 - 197 A), the Court denied the motion "on the grounds that it is not clear what the agent was referring to" and because the revelation was "not so prejudicial...as to deny the defendant's a fair trial"(197-198 A).

Although counsel for defendant-appellant, LUBRANO, requested permission to complete his position on this point for the record, the request was denied "because the reporter is tired." The Court did not grant counsel this opportunity, however, after the reporter had rested (198 A).

It is respectfully submitted that the improper implications of the existence of tape recordings impliedly audible and corroborative of the government's contentions concerning MR. LUBRANO, under the instant circumstances

where the recordings were in fact inaudible and valueless, required the granting of each of the two timely motions for mistrial made by defendant-appellant LUBRANO.

POINT IV

IMPROPER AND PREJUDICIAL COMMUNICATION BETWEEN PROSECUTION AND TWO JURORS REQUIRE A REVERSAL.

A. The Prosecutor's Communication and Conduct were Prejudicial to the Defendant.

During the course of the trial, counsel for one of the defendants, Mr. Graber, observed Agent Fernandez, an employee of the Federal Government and an assistant to the United States Attorney, converse with two of the jurors, receive money from them, and head in the direction of the cafeteria. (59 A) Over Defense Attorney Graber's specific objections, Agent Fernandez went ahead and purchased coffee in the cafeteria, returned to the two jurors, gave them the coffee, and engaged in another conversation (59 A).

As a trial assistant to the Prosecuting Attorney, Agent Fernandez sat at the Assistant United States Attorney's table and was an active participant at this trial. (59 A) Both the prosecuting Assistant United States Attorney (63 A) and the presiding Trial Judge (62) agreed that the Agent's conduct was most improper. The Court, however, denied the defendant's motion for a mistrial (62 A).

The Supreme Court has noted that "private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are

absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150 (1892).

In Pekar v. United States, 315 F 2d 319 (5th Cir. 1963), the Assistant United States Attorney had a conversation with one of the jurors concerning the juror's line of business during the recess in a criminal case. The U. S. Court of Appeals found that such social contact, presumably in the presence of other jurors who were passing through the courthouse corridors, "is not only inexcusable, it is clear grounds for the setting aside of a conviction. It is not surprising that very few cases can be found in the Federal Courts where this subject is discussed. This is because such conduct is rare."

While commenting on the impropriety of counsel for one of the parties in a civil case conversing with the jury during the intermission of the trial, the District Court in Palmer v. Miller, 60 F. Supp. 710 (W. D. Mo. 1945), cited with approval a Missouri State decision which concluded that "should it appear that a party or his counsel with improper design has succeeded in bestowing favor on a juror, though it consists of nothing more than social attention, a verdict in favor of the offending party should be set aside." In Pekar, 315 F. 2d 319, 322, the Court of

Appeals also quoted the above rule and stated that even stricter standards are required in criminal cases.

In the case before this Court, Agent Fernandez's ingratiating himself to the two jury members by doing favors for them was clearly prejudicial to the defendant. "Communications, between jurors and third persons or officers in charge of the jury, are absolutely forbidden, and if it appears that such communications have taken place, a presumption arises that they were prejudicial." United States v. Sorcez, 151 F. 2d 899, 903 (7th Cir. 1945), cert. denied 327, U.S. 794 (1945); Wheaton v. United States, 133 F. 2d 522 (8th Cir. 1943); and United States v. Rakes, 74 F. Supp. 645 (E.D. Va. 1947). Moreover, where the evidence shows that a conversation did occur between the prosecuting attorney and some members of the jury, this raises a presumption of prejudice. Ryan v. United States, 191 F. 2d 779 (D.C. Cir. 1951), cert. denied Duncan v. United States, 372 U.S. 928 (1952).

The misconduct of Agent Fernandez cannot be excused by asserting that the United States Marshal asked the agent to help the jurors (60 A). This is especially so in view of District Attorney Graber's expressed request to Agent Fernandez that he cease the conduct in question before it was concluded. (59A) Moreover, no evidence was offered that the

conversation between the Agent and the jurors was not prejudicial, other than the hearsay statements of the Assistant United States Attorney, as the Court never made inquiries of either Agent Fernandez or the two jurors as to the nature of their discussions. Nor do we know the effect of this incident upon any of the remaining jurors, who were not questioned as well, as they could have witnessed this misconduct since they were presumably present in the same courthouse hall when this conversation took place. In short, the Government has failed to rebut the presumption that these communications were prejudicial, especially when considering that the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that contact with jurors was harmless to the defendant. Remmer v. United States, 347 U.S. 227 (1954).

B. In the Alternative, the Court Erred in Failing to at Least Hold a Hearing on the Improper Communications Before Denying the Defendant's Motion for a Mistrial.

As indicated already, the Court, by failing to hold a full fact-finding hearing, deprived the appellant of the opportunity to hear the testimony and to cross-examine the witnesses to the misconduct, including the two jurors, Agent Fernandez, the United States Marshal who had requested

that Agent Fernandez communicate with the jurors, and any of the other jurors present in the courthouse hall who witnessed the improper conduct.

Where a Government witness made a comment to one juror during the inspection of the scene of the crime, the Court of Appeals, Fifth Circuit, in Johnson v. United States, 207 F. 2d 314, 322, (5th Cir. 1953), cert. denied 347 U.S. 938 (1954), noted that "when the incident was brought to the attention of the Trial Court, a thorough inquiry was made by it to determine exactly what had occurred. Testimony of the offending witness was heard and counsel was given an opportunity to give their respective versions of what had happened in their presence." Only after hearing this testimony did the Court overrule the motion for a mistrial and carefully instructed the jury to dismiss the incident from their minds.

The Court of Appeals concluded in Johnson that the Trial Court adopted the appropriate procedure of probing the matter by an extensive hearing at which the jurors who participated in the interchanges testified they were not biased thereby. In Ryan v. United States, 191 F. 2d 779, (D.C. Cir. 1951), cert. denied, Duncan v. United States, 372 U.S. 928 (1952), the Court also held hearings on the mistrial

motion where several jurors and other witnesses were examined and cross-examined, while in Wiltsey v. United States, 222 F. 2d 600 (4th Cir. 1955), a motion for a mistrial on the grounds that one of the witnesses for the prosecution sat for lunch at the hotel table at which two of the jurors were sitting was denied only after a Judge investigated the matter thoroughly and found that nothing occurred by which appellant's cause could have been prejudiced. In brief, our research has failed to turn up a case on this point in which the Trial Court did not conduct an extensive inquiry on the improper communication.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the judgment of conviction be reversed and judgment of acquittal entered.

Respectfully submitted,

L. Hochheiser

HOCHHEISER & COHEN
Attorneys for Defendant
PHILIP LUBRANO

LAWRENCE HOCHHEISER
KENNETH J. ARONSON
On the Brief